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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STACEY C. KOON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE VILLAGE OF HOFFMAN ESTATES, ILLINOIS an Illinois Municipal Corporation IN SUPPORT OF THE PETITIONER

RICHARD N. WILLIAMS
Corporation Counsel
1900 Hassell Road
Hoffman Estates, IL 60195
708/885-8110

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BRIEF AMICUS CURIAE
OF THE VILLAGE OF HOFFMAN ESTATES, ILLINOIS
an Illinois Municipal Corporation

This brief is filed pursuant to the authority granted by Rule 36.5 of the Rules of the Supreme Court of the United States by the Village of Hoffman Estates, Illinois, an Illinois municipal corporation.

INTEREST OF AMICUS CURIAE

The Village of Hoffman Estates, Illinois (hereinafter called "Hoffman Estates") is a municipality with a population of approximately 48,000 persons. Hoffman Estates is situated in the northwest suburbs of Chicago, Illinois. Under the Illinois Constitution of 1970, Hoffman Estates is a home rule unit of government.

Hoffman Estates employs 410 employees, 100 of whom are Police Officers. The Department Directors generally and the Police Chief specifically are required to conduct internal investigations of alleged employee misconduct from time to time. A *Garrity* admonition is required by the Seventh Circuit Court of Appeals, state statutes and labor agreements prior to ordering a statement from an employee. The employee is advised that any statement or fruit of such statement cannot be used against him in a criminal proceeding but that he is subject to disciplinary action if he refuses to give a statement.

The conflict of circuits created by the Ninth Circuit Court of Appeals rule on "use" of statements in a criminal proceeding, in contradiction of the District of Columbia Court of Appeals rule on "use" of statements in a criminal proceeding, puts in jeopardy the ability of municipal governments to order answers to questions related to the integrity and efficiency of the municipality. This has resulted because the Ninth Circuit Court of Appeals has created an "independent source exception" to use immunity, and the statement and fruits can be used against the employee if an independent source exists.

Charges of insubordination of employees remaining silent after the *Garrity* admonition will not be upheld if the use immunity is an empty promise under the Ninth Circuit Court of Appeals rule. Hoffman Estates respectfully asks this Court to consider the day-to-day problems created by the Ninth Circuit Court of Appeals ruling and set a clear standard for "use" immunity based upon the District of Columbia Court of Appeals standard for all jurisdictions.

ARGUMENT

I

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF USE IMMUNITY FROM COMPELLED STATEMENTS.

The promise of *Garrity v State of New Jersey*, 385 U.S. 493 (1967) that policemen "are not relegated to a watered-down version of constitutional rights" (385 U.S. at 500) rings hollow in the Ninth Circuit. That Court in *United States v Koon*, 34 F.3d 1416 (9th Cir.-1994) distinguished its view of compelled testimony from the standard of the District of Columbia Circuit in *United States v North* ("North I") 910 F2d 843 modified ("North II") 920 F2d 940 (D.C. Cir.-1990) cert. denied, 500 U.S. 941 (1991) by stating that the *Kastigar* burden is met by

Recent challenges by police officers to the "use" of their internal investigation statements at a grand jury and the extent of protection afforded indicate the concern that public employees and employers have to the use and extent of "use" immunity, *In Re Grand Jury Subpoenas v United States*, 40 F3d 1096 (10th Cir.-1994) and *In Re Grand Jury Proceedings v United States*, 45 F3d 343 (9th Cir.-1995).

Because of the Ninth Circuit's "independent source exception" rule of use immunity, officers and their associations are reticent to fully cooperate in internal investigations and have taken to "Garritizing" themselves prior to answering routine inquiries of supervisors when giving answers. Additionally, in formal and informal inquiries, officers are not being fully responsive to legitimate questions relating to job performance. The F.O.P. and other associations distribute "Garrity" cards to officers to preface responses and reports due to the fears of abuse of the use immunity. An example is the San Antonio Police Officers Association Card, as follows:

> It is my understanding that this report is made for administrative, internal police department purposes only and will not be used as part of an official investigation. This report is made by me after being ordered to do so by lawful supervisory officers. It is my understanding that by refusing to obey an order to write this report that I can be disciplined for insubordination, and that the punishment for insubordination can be up to and including termination of employment. This report is made only pursuant to such orders and the potential punishment/discipline that can result for failure to obey that order.

For effective law enforcement administration and protection of the rights of all public employees, the Court should resolve the conflict in the standard of review for use immunity between the *North* court and the *Koon* court as well as other circuit courts of appeals cited in the Petition.

CONCLUSION

Amicus submits that the judgment of the court below should be reviewed so that a consistent standard for use immunity under *Kastigar* can be established and that the District of Columbia Circuit's standard in *North* be adopted.

Respectfully submitted,

RICHARD N. WILLIAMS
Corporation Counsel
1900 Hassell Road
Hoffman Estates, IL 60195
708/885-8110

June 15, 1995